No. 80888-1

WASHINGTON STATE SUPREME COURT

KIMME PUTMAN,

Appellant,

v.

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington professional service corporation; PATRICK J. WENDT, M.D., DAVID B. LEVITSKY, M.D.; SHAWN C. KELLEY, M.D.; and JOHN DOE NO. 1; JOHN DOE NO. 2; JANE DOE NO. 1; and JANE DOE NO. 2,

Respondents.

On Appeal from Chelan County Superior Court,
No. 07-2-00060-1
Honorable John E. Bridges

APPELLANT KIMME PUTMAN'S ANSWER TO THE AMICUS BRIEF OF THE WASHINGTON STATE MEDICAL ASSOCIATION, ET AL.

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I. INTRODUCTION

Appellant Kimme Putman submits this Answer to the *amicus curiae* brief filed by the Washington State Medical Association, *et al.* (collectively "WSMA"). As demonstrated earlier, the certificate of merit requirement is unconstitutional. *Amici* argue otherwise, but their arguments misconstrue the constitutional principles at issue. A fair reading of the relevant precedent supports Putman's arguments.

II. THE CERTIFICATE OF MERIT REQUIREMENT IN RCW 7.70.150 IS PALPABLY PROCEDURAL AND VIOLATES SEPARATION OF POWERS

A. RCW 7.70.150 Is Plainly Procedural

In asserting that RCW 7.70.150 is not procedural but substantive, WSMA Br. 1-5, *Amici* misread this Court's relevant decisions. Washington's courts have the inherent "power to prescribe rules for procedure and practice." *State v. Smith*, 84 Wn.2d 498, 501, 527 P.2d 674 (1974) (citations omitted). *Amici* correctly note that substantive law "creates, defines, and regulates primary rights," while procedure focuses on the machinery by which those rights are effectuated. WSMA Br. 1, citing *State v. Templeton*, 148 Wn.2d 193, 213, 59 P.3d 632 (2002). Where they err, however, is in denominating the certificate of merit as a "primary right," rather than what it is: a form of verification of the complaint. It is merely an adjunct to the complaint, required to set the

lawsuit in motion. It forms no element of proof and plays no role whatsoever in determining ultimate liability or damages. *Cf. Greene v. Union Pac. Stages*, 182 Wn. 143, 145, 45 P.2d 611 (1935) ("a defective verification does not affect the merits").

CR 8 provides general rules of pleading, and CR 11 specifies that pleadings in cases other than divorce and custody proceedings *need not be verified. See* CR 8; CR 11(a). RCW 7.70.150, enacted by the legislature, squarely conflicts with CR 8 and CR 11, by requiring that a "plaintiff must file a certificate of merit at the time of commencing the action." CR 8(e)(1) states explicitly that "[n]o technical forms of pleadings or motions are required." CR 11 limits the type of verification that RCW 7.70.150 requires to two specific types of cases – divorce and custody proceedings. RCW 7.70.150 cannot be reconciled with the plain language of these rules because it requires an affirmation as a precondition to filing a medical negligence case. Under this Court's decisions and as confirmed by statute, the civil rules of procedure must prevail over the legislatively imposed certificate of merit requirement. *Smith,* 84 Wn.2d at 501; RCW 2.04.200.

The legislature, moreover, has recognized the Court's inherent authority to set rules. RCW 2.04.190 provides,

> The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, *the mode and manner of framing and filing proceedings and*

> *pleadings*; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and *generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading*, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts and justices of the peace of the state.

RCW 2.04.190 (emphasis added).

Amici nonetheless assert this Court should harmonize the apparent conflict between the procedural rule and the certificate requirement. While *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997), recognizes that a court "makes every effort to harmonize" conflicts between court rules and procedural statutes, it added that "[w]hen a court rule and procedural statute are inconsistent, the court rule governs." *Id.* (citing *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984)).

Unlike in *Blilie*, however, Civil Rules 8 and 11 cannot be harmonized with the certificate of merit requirement. The certificate of merit renders Rule 8's provision of notice pleading irrelevant by increasing the pleading requirements. If a plaintiff fails to file the certificate of merit requirement her claim will be dismissed regardless of whether she satisfies Rule 8's requirements. CR 11 "eschews any need for an affidavit of merit," and the certificate of merit requirement insists upon it. (Putman Corrected Br. 12). It is impossible to satisfy both requirements,

and thus the conflict is palpable.

B. Federal Court Decisions Are Not Instructive on Whether the Certificate Is Procedural or Substantive

WSMA asserts that the decisions of federal courts in diversity cases support its contention that the certificate of merit is a rule of substance rather than one of procedure. WSMA, however, conflates the analytical distinction between substance and procedure for the purposes of state separation of powers analysis with that considered by a federal court applying the doctrine derived from *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The two analyses are distinct, as the U.S. Supreme Court has made plain.

That Court has said that "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (footnote omitted). The key consideration in the federal analysis is whether the outcome will be the same regardless of whether the case is tried in a federal or state forum. *Id.* The analysis reflects what the Court has called the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 428 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)). Thus, the procedural-

substantive analysis that takes place for *Erie* purposes is solely designed to discourage forum-shopping between the state and federal courts in diversity cases so that the citizen of the forum state has all the protections of that state's valid laws and the forum does not dictate the result.

As a sister court noted, the distinction between procedure and substance that is made in assessing whether "federal or state law should govern in federal diversity of citizenship cases" is distinguishable from that made "in determining limits of the judiciary's power to make rules of court." *Schoenvogel ex rel. Schoenvogel v. Venator Group Retail, Inc.*, 895 So.2d 225, 247 (Ala. 2004) (citation omitted). Scholars have long "warned against an assumption that substance and procedure have universal meanings for all purposes." *Id.* (citation omitted).

The *Erie* considerations in the federal cases *Amici* cited have no rational application to whether a rule is substantive or procedural within the state court system. For example, in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000), cited in WSMA Br. 2, the court found that the New Jersey certificate of merit was "outcome determinative on its face, and failure to apply it would encourage forum shopping and lead to the inequitable administration of the law." *Id.* at 161. The court also "perceive[d] no overriding federal interest here that would prevent application of the state law by the federal courts." *Id.* That rational does

not dictate a result here, for a "rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account." *Schoenvogel*, 895 So.2d at 247.

The substantive-procedural dichotomy followed in this State is not a function of determining whether the law changes the character or result of the litigation because of the forum chosen. Instead, it is properly about whether the rule creates, defines, or regulates any primary right. The certificate of merit does not create a right, nor does it provide any basis for a judgment on the allegations before the court. It merely is a document to accompany the complaint in initiating the lawsuit. It is undeniably procedural for the purposes it was intended to perform.

C. Ohio, Rather Than Illinois, Provides the Most Pertinent Precedent

Without any authority, *Amici* nakedly assert that Ohio takes "an approach to 'separation of powers' analysis to which this Court does not subscribe." WSMA Br. 2. Citing *In re Mowery*, 141 Wn. App. 263, 281, 169 P.3d 835 (2007) for the Washington approach, *Amici* assert that the functions of the separate branches may permissibly overlap as long as one branch does not undermine the operation of the other branches. WSMA Br. 2. Laws conflicting with procedural rules cross that line. *See Washington State Bar Ass'n v. State*, 125 Wn.2d 901, 908-09, 890 P.2d

1047 (1995).

Ohio's law is on all fours with Washington's. Ohio's courts recognize that the doctrine of separation of powers "does not mean that there is an hermetic seal between executive, legislative, and judicial functions." *Cleveland Police Patrolmen's Ass'n v. Voinovich*, 15 Ohio App. 3d 72, 472 N.E.2d 759, 762 (1984). *See also Incorporated Village of Fairview v. Giffee*, 73 Ohio St. 183, 76 N.E. 865, 866 (1905) (stating that complete separation of powers does not occur in practice and that it is "practically impossible to distinctly define the line of demarkation between the different departments of government"). And like Washington, Ohio abides by the general rule of statutory interpretation that attempts to harmonize a statute with the state constitution if at all possible. *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. Westlake*, 97 Ohio St. 3d 100, 776 N.E.2d 1041, 1047 (2002). In fact, Ohio holds, again as in Washington, that the "separation-of-powers doctrine is applied only when there is some interference by one governmental branch with the constitutional authority of another governmental branch." *State ex rel. AFSCME v. Taft*, 156 Ohio App. 3d 37, 804 N.E.2d 88, 96-97 (2004).

Thus, there is no basis to assert, as *Amici* do, that Ohio follows a different separation of powers analysis from Washington. And there is no basis to deny the instructive usefulness of the Ohio Supreme Court's

decision in *Hiatt v. Southern Health Facilities, Inc.*, 68 Ohio St. 3d 236, 626 N.E.2d 71 (1994), striking down a certificate of merit requirement as being in conflict with Ohio's CR 11, which stated that "pleadings need not be verified or accompanied by affidavit." Ohio Civ. R. 11.

On the other hand, *Amici* urge a misplaced reliance on Illinois law. *Amici* cite *McAlister v. Schick*, 147 Ill. 2d 84, 588 N.E.2d 1151 (1992) as upholding a similar certificate requirement. WSMA Br. 4. However, unlike RCW 7.70.150, the Illinois statute only required "the plaintiff's attorney or the plaintiff, if proceeding *pro se*, attach to the complaint an affidavit certifying that he has consulted and reviewed the facts of the case with a health professional, who has determined in an attached report that there is 'a reasonable and meritorious cause' for filing the action." *Id.* at 1152. There was no need to identify the medical professional. And, most importantly, the plaintiff's sole separation of powers argument in that case was that the affidavit requirement "usurps the judiciary's power to hear and decide medical negligence cases." *Id.* at 1153. Not only was there no contention made that the requirement conflicted with a civil rule, but the Illinois Supreme Court acknowledged that similar requirements had been part of Illinois law since 1862. *Id.* at 1162. *McAlister* is inapposite.[1]

[1] A new medical malpractice certificate of merit requirement was challenged in Illinois in *Lebron v. Gottlieb Mem. Hosp.*, No. 2006 L 12109 (Ill. Cir. Ct. Nov. 13, 2007), on the basis of its conflict with a court-made rule. The trial court found the statute

D. The Certificate Requirement Is a Form of Verification

Amici further insist that "RCW 7.70.150 does not require a certificate of merit made under oath and thus is not a verification requirement." WSMA Br. 3. Washington law, however, has long recognized that a verification consists merely of a person indicating the belief that "the contents of the complaint" are true. *Burdick v. Burdick*, 7 Wn. 533, 534, 35 P. 415 (1893). The entire purpose of a verification requirement is to ensure truthfulness of pleadings and to discourage claims without merit. *Schoonover v. State*, 116 Wn. App. 171, 64 P.3d 677 (2003). Thus, for example, the requirement of a verified complaint under CR 23.1 merely requires "the confirmation of the correctness, truth or authenticity of the pleadings." *RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wn. App. 265, 271, 864 P.2d 12 (1993) (citing 7C C. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1827, at 50 n.2 (1986)).

RCW 7.70.150's requirement of a certificate of merit plainly constitutes a form of verification. It is a certification by qualified experts as to each defendant's failure to conform to the applicable standard of

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unconstitutional because its cap on damages conflicted with separation of powers. The certificate requirement was struck as well because the statute contained a non-severability clause. No separate analysis of the certificate requirement was made. The case is currently under advisement in the Illinois Supreme Court. Nos. 105741 & 105745 (argued Nov. 13, 2008).

care. As such, it constitutes expert verification of the truthfulness of the complaint's allegations. *Amici's* emphasis on the lack of requirement of an oath is unavailing. No expert, seeking to protect his or her professional reputation, providing testimony later at trial and aware that the certificate provides fodder for cross-examination at trial, or wishing to avoid charges of professional misconduct before a medical society, *see* Putman Corrected Br. 20 n.12, would provide a certificate that is less than truthful. The fact that such a licensed professional is not required to do so under oath does not render the requirement any less a conflict with CR 8 or CR 11. Verification by any other name is still verification.

III. THE CERTIFICATE OF MERIT REQUIREMENT VIOLATES WASHINGTON'S OPEN COURTS GUARANTEE

WSMA takes a limited view of Article I, Section 10 of the Washington Constitution, asserting that the provision merely guarantees that "courts may not act in secret." WSMA Br. 5. This Court, however, has held that the provision encompasses a broad right of access to the courts.

At common law, "the right of access to the justice system was fundamental and deemed necessary to the ability of citizens to assert, enforce, defend, and protect absolute rights." James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in*

Non-Criminal Cases in Washington State, 5 SEATTLE J. FOR SOC. JUST. 383, 397-98 (2005).[2] In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991), this Court, construing Article I, Section 10, explained:

> That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations.

Part and parcel of protecting and maintaining individual rights is "enforc[ing] obligations" between people and providing a forum in which persons may seek recourse and a remedy when those rights are infringed.

In *1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001), *cited in* WSMA Br. 6-7

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[2] The U.S. Supreme Court has been emphatic about the importance of this type of right. As Chief Justice John Marshall wrote, "the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury," and "[o]ne of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803).

A century after *Marbury*, the Court explained that "the right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). Similarly, a generation ago, the Court ruled that "[r]esort to the judicial process . . . is not only the paramount dispute-settlement technique, but, in fact, [often] the only available one," and therefore central to due process. *Boddie v. Connecticut*, 401 U.S. 371, 376-77, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

The right is "'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (quotation omitted), and so "'implicit in the concept of ordered liberty,'" that "'neither liberty nor justice would exist if [it was] sacrificed,'" *id.* (quotation omitted).

as the "most recent comment as to a "remedy guarantee," this Court stated that whether the open courts provision provides a right to a remedy remains an open question. Subsequently and thus *more recently*, however, this Court explained that it applies the open courts provision in one of two ways, "the right of the public and press to be present and gather information at trial and the right to a remedy for a wrong suffered." *King v. King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) (quoting Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 24 (2002)). While *King*'s recognition of a remedy guarantee in Article 1, Section 10, is *dicta,* it is also the Court's clearest and most recent statement confirming the existence of that guarantee. In *Lakeview Blvd.*, the Court distinguished its now 73-year-old holding in *Shae v. Olson*, 185 Wn. 143, 160-61, 53 P.2d 615 (1936), on the ground that *Shae* did not directly address Article I, Section 10. That distinction signifies the usefulness of reaffirming the statement in *King,* including its origin in Article I, Section 10 and the test for determining whether a statute violates the guarantee, like one proposed in the Washington State Association for Justice Foundation's Amicus Brief at 17-20.

Significantly, the passage in *Lakeview Blvd.* upon which the WSMA *Amici* heavily rely "adopt[s] the view of the Supreme Court of Oregon" in construing the remedy issue. 144 Wn.2d at 580-81, cited at

WSMA Br. 6. That view of Oregon's cognate open courts provision "consistently has held that the law must provide a means for seeking redress for injury." *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 23 P.3d 333, 353-54 (2001) (citations omitted). Just as the U.S. Supreme Court recognizes a fundamental right of access to the courts, *see Christopher v. Harbury*, 536 U.S. 403, 415 n.12, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), this Court recognizes "'[f]ull access to the courts . . . is a fundamental right.'" *King,* 162 Wn.2d at 390 (quoting *Bullock v. Roberts*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974) (citing *Boddie v. Connecticut*).

As Ms. Putman discussed in her opening and reply briefs, the certificate of merit requirement violates her fundamental right of access to courts in two key ways. First, the requirement imposes significant burdens of proof that are inconsistent with notice pleading. Second, it imposes additional and substantial costs to litigation that effectively restrict access to the courts. *See* Putman Corrected Br. 18.

While *Amici* snidely deride Ms. Putman's complaint as "a contention that injured persons have a constitutional right to be represented by incompetent counsel," WSMA Br. 9, the certificate requirement obligates a party to proffer information much earlier than would otherwise be required. It is one thing to consult a medical expert

based on the limited information available without compulsory discovery, receive assurances that the information available supports the plaintiff's malpractice theory, and identify other information that it would be necessary to obtain, but quite another entirely to have such an expert commit a signed opinion to writing based on assumptions.[3] While Ms. Putman could get a 90-day extension to file the certificate of merit, that extension would not negate the requirement, which forces her to have access to material controlled by the defendant significantly earlier than she would in the ordinary course of litigation. WSMA argues that Ms. Putman could seek discovery to obtain the information but one cannot seek discovery prior to filing an action. Moreover, without the court's enforcement mechanism, there is no incentive or obligation on the part of the health care provider to provide responses to Ms. Putman's pre-discovery requests.

Amici's attempt to analogize RCW 7.70.150 to summary judgment, WSMA Br. 9, fails for similar reasons. A motion for summary judgment is subject to a motion for a continuance, pending further necessary discovery. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

[3] While WSMA asserts a straw-man argument that there is no "constitutional right" to discovery, WSMA Br. 10, Washington courts recognize that it is an abuse of discretion for a court to deny a request for pertinent discovery before disposing of a case. *See, e.g., Hertog v. City of Seattle*, 88 Wn. App. 41, 943 P.2d 1153 (1997).

Clearly, RCW. 7.70.150 impinges significantly on the fundamental constitutional right of access to the courts.

IV. THE CERTIFICATE OF MERIT VIOLATES ART. I, § 12'S GUARANTEE OF EQUAL PROTECTION

As Ms. Putman argued earlier, the certificate of merit treats victims of medical negligence differently than other plaintiffs alleging claims based on negligence and there is no rational basis for this discrimination. WSMA denies this[4] and further asserts, even if it did, the discriminatory treatment is of no consequence because "Washington for many years has made distinctions between tort claimants." WSMA Br. 12.

The cases that WSMA cites for support are inapposite because they involve state-created statutory causes of action instead of common law negligence, such as Ms. Putman has alleged. Washington created a statutory cause of action for product liability, RCW 7.72.030, Chapter 7.72. Litigants filing claims under the act are differently situated than are those alleging common law negligence. *Cf. Falk v. Keene Corp.*, 113 Wn.2d 645, 656, 782 P.2d 974 (1989) (reference to negligence standards

[4] WSMA offers a proposition that has no place in the law when it asserts that the support of lobbying groups, who may have adapted their position to the politics of that moment, renders a law constitutional. *See* WSMA Br. 13. If anything, the Constitution's restrictions on legislative action are necessarily counter-majoritarian and are not subject to a poll or a vote. *See Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 & 737 n.30, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964) (quotation omitted from second quotation) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be" and "It is no answer to say that the approval of the polling place necessarily evidences a rational plan. The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection.").

in design-defect case held misleading and warranting reversal). The statutory cause of action allows a product liability claimant to recover without proving fault while a plaintiff alleging a common law claim may not. When the legislature creates a cause of action, the legislature may alter or limit it more freely than it may a common law claim. Where "the right to bring suit was created by statute [it] is not a fundamental right." *Medina v. Public Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 312, 53 P.3d 993 (2002) (citing *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965).

Similarly, *Medina*, cited by WSMA, involved a cause of action created by the legislature. There, the "Legislature waived sovereign immunity as to the political subdivisions of the State and its municipalities in 1967." 147 Wn.2d at 312. Even in *Medina*, however, the Court recognized that the legislature created classifications between tort plaintiffs – those suing the government and those suing private actors – and that those "legislative classifications must conform to the equal protection guaranties of the state and federal constitutions." *Id.* (citing *Jenkins v. State*, 85 Wn.2d 883, 890-91, 540 P.2d 1363 (1975)). Here, unlike in *Medina*, there is no rational relationship between the purpose of the statute and the certificate of merit provision.

Section 1 of SSHB 2292, which became RCW 7.70.150, declares

that the bill was intended to provide access to safe, affordable health care, in part by promoting high-risk specialty providers in underserved areas, and to prevent any further increase in malpractice insurance premiums, as a response to the perceived but definitely unsubstantiated rise in malpractice filings. A certificate of merit requirement does nothing to improve access to health care. And it does not lower malpractice insurance premiums. *Cf. DeYoung v. Providence Med. Cntr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998) (holding challenged law "could not rationally" address medical malpractice insurance crisis). WSMA suggests that the certificate of merit requirement promotes the legislature's goals because it prevents frivolous lawsuits. As Ms. Putman has established in prior briefing, the impact is to deter meritorious lawsuits, while any legitimate concern about frivolous actions is already guarded against by CR 11, RCW 7.70.160 (sanctioning frivolous medical malpractice filings), and RCW 4.84.185 (frivolous action statute). If preexisting solutions are inadequate, they are inadequate for all negligence cases and not just medical negligence cases.

Moreover, although courts throughout the country have adopted the U.S. Supreme Court's "no set of circumstances" approach invoked by WSMA here, WSMA Br. 16, its usefulness is strictly limited. As the Supreme Court has said it has never abided by a "no set of circumstances"

standard and instead has merely used these criteria with respect to issues of standing. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 19 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Once standing is established, that Court said that setting up this type of prudential limitation on facial challenges "would serve no functional purpose.'" *Id.* (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 243, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983)).

Because no rational basis is served by treating medical negligence plaintiffs differently than other negligence claimants, the certificate of merit provision violates the constitution's equal protection guarantee.

V. THE CERTIFICATE OF MERIT PROVISION IS AN UNCONSTITUTIONAL SPECIAL LAW

WSMA asserts that "[i]t is not irrational to exclude plaintiffs suing for injury or death due to something other than alleged medical malpractice from the class of persons required to file certificates of merit." WSMA Br. 17. In making this claim, WSMA misconceives Ms. Putman's claim that the certificate of merit provision violates Article II, Section 28's prohibition on special legislation.

Ms. Putman asserts that the certificate of merit provision is a special law because it confers a benefit on medical negligence defendants that other defendants in personal injury cases are not granted. Moreover,

the state lacks a reasonable basis for granting this disproportionate benefit to healthcare provider- and hospital-defendants.

WSMA relies on *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627-28, 90 P.3d 659 (2004), for the proposition that "a statute is not unconstitutional special legislation, even when it creates a class consisting of one member, unless exclusions from the class are irrational." What Plaintiff objects to is not the limited size of the class, but rather, that the certificate of merit requirement confers a benefit on only one type of personal injury defendant – a healthcare provider defendant – and that the benefit lacks a rational basis. Moreover, the benefit has the effect of limiting civil actions against health-care provider defendants.

Port of Seattle recognizes that such distinctions violate the special legislation clause of the Washington Constitution: "Article II, section 28 of the Washington Constitution prohibits the legislature from enacting any private or special laws that grant corporate powers or privileges, legalize an unauthorized or invalid act of a state officer, or limit civil or criminal actions." 151 Wn.2d at 627-28 (citing Const. art. II, § 28(6), (12), (17)). Special legislation "operates upon a single person or entity while general legislation operates upon all things or people within a class." *Id.* (citing *Brower v. State*, 137 Wn.2d 44, 60, 969 P.2d 42 (1998)). As WSMA states, a class may include a single member, but "the test of special

legislation is what it *excludes*, not what it *includes*. . . . [A]ny exclusions from a statute's applicability, as well as the statute itself, must be rationally related to the purpose of the statute." *Id.* at 628) (emphasis added) (quoting *Island County v. State*, 135 Wn.2d 141, 150, 955 P.2d 377 (1998) (quoting *City of Seattle v. State*, 103 Wn.2d 663, 674-75, 694 P.2d 641 (1985))). Because, as Ms. Putman has previously argued, there is no rational relationship for providing health care defendants additional information at the outset of litigation and making it more difficult for plaintiffs to bring cases against such defendants, the certificate of merit requirement violates the special legislation clause.

VI. CONCLUSION

For the foregoing reasons, Appellant Kimme Putman respectfully requests that this Court declare RCW 7.70.150 unconstitutional.

Dated: February 17, 2009 Respectfully Submitted,

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DATED this 17th day of February, 2009.

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